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IN THE

Supreme Court of the United States

October Term, 1952

No. 441

TRADERS COMPTROLLER COMPANY, a Corporation, *Petitioner*,

v.

MAURICE J. TOBIN, Secretary of Labor, United States Department of Labor, *Respondent*

MEMORANDUM FOR THE NATIONAL COTTON COUNCIL OF AMERICA AND THE AMERICAN FARM BUREAU FEDERATION AS AMICI CURIAE IN SUPPORT OF PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Written consent of all parties to the filing of this memorandum has been obtained as required by Rule 27 of this Court.

The National Cotton Council of America is a national non-profit organization whose membership embraces every segment of the raw cotton industry, including cotton farmers in all of the cotton producing states, cotton ginners, cotton warehouse and compress warehouse operators, cottonseed processors, cotton merchants and spinners.

The American Farm Bureau Federation is a voluntary general farm organization composed of 1,492,282 farm families in forty-seven states of the United States and Puerto Rico.

This action involves the validity of the regulations defining "area of production" as used in Section 13(a)(10) of the Fair Labor Standards Act of 1938, as amended.[1] This section of the Act provides an exemption from the wage and hour provisions of the Act for "any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products."

The question relates to the validity of the population and distance limitations, contained in the definition of "area of production."[2]

The United States District Court for the Eastern District of Oklahoma held that the definition had no reasonable relationship to the purposes of the exemption and was therefore arbitrary and capricious. The United States Court of Appeals for the Tenth Circuit (one Judge dissenting) held the regulation valid and reversed the District Court.

The National Cotton Council of America and the American Farm Bureau Federation respectfully urge this Court to review the judgment of the court below for the following reasons:

1. The proper determination of the "area of production" and the proper application of the exemption provided by Section 13(a)(10) of the Act are of the utmost importance to and affect practically all farmers of the nation. The legislative history of the Act and the opinion of this Court in *Addison et al.* v. *Holly Hill Fruit Products, Inc.*,[3] clearly show that the Congress in granting the exemption expressed in Section 13(a)(10) was acting for the

[1] See Appendix A, p. 8, *infra*.

[2] See Appendix B, p. 8, *infra*.

[3] 322 U. S. 607, 64 S. Ct. 1215

protection of the farmer so as to make possible the storage, processing and marketing of his crops at reasonable cost and free of the incidence of the wage and hour provisions of the Act in facilities and markets which he normally is compelled to use. Thus, not only has employment in agriculture been completely and entirely exempted under Section 13(a)(6) of the Act, but Section 13(a)(10) extends this basic agricultural exemption to all non-agricultural employees who perform certain specified activities in connection with the marketing of agricultural commodities in the "area of production." Unless "area of production" is defined in the light of the fundamental purpose of Congress in creating the exemption, additional financial burdens will be placed on farmers contrary to the specific exemption granted by Section 13(a)(10). We do not believe that these burdens should be placed on farmers in the absence of a review by this Court of the ruling below.

In addition to the effect of this question upon the farmers of the nation, there are many thousands of employees and employers who because of the uncertainties involved do not know the extent of their rights or obligations under Section 13(a)(10) of the Act.[4]

2. The definition of "area of production" and the scope of the exemption granted by Section 13(a)(10) has been the subject of much controversy and litigation ever since the enactment of the Fair Labor Standards Act of 1938, and unless the question is resolved and settled by this Court the Administrator and persons subject to the Act will be confronted with many serious problems.

The Administrator has promulgated at least four different definitions of "area of production", one of which was held invalid by this Court in *Holly Hill*. The various attempts to define this term are indicative of the uncertainty and confusion which exist in the administration of the Act. And the Administrator's view that the exemption

[4] 1948 Annual Report, Wage and Hour and Public Contracts Division, United States Department of Labor, pp. 125, 129.

has no sound justification has certainly not aided in eliminating the confusion or contributed to the promulgation of a proper definition.[5]

Because of the importance of the definition to effective administration, the Administrator appeared as amicus curiae in *Holly Hill* in support of the petition for a writ of certiorari and this Court in recognition of the national importance of the question involved granted the writ.[6] Unfortunately, however, the decision in *Holly Hill* has not brought an end to the controversy. Since that decision, as shown on page 7 of the petition for a writ of certiorari, at least eighteen actions have been brought in state and federal courts involving the validity of the current definition. Three of these cases were decided in favor of the defendants and fifteen are still pending. The Secretary of Labor, who has the responsibility for administering and enforcing the Act, apparently is strongly of the opinion that a definitive review of the question at this time is necessary. In his memorandum in reply to the petition for a writ of certiorari, he points out that the definition of "area of production" is determinative of the applicability of the Act to numerous employees employed in a wide variety of activities and that there have been years of delay in the enforcement of the Act because of the invalidity of prior definitions. He further states that review is desirable at this time because of pending and anticipated similar litigation.[7]

If the decision of the court below is not reviewed by this Court, uncertainty, confusion and administrative difficulty can be expected to continue and additional litigation to result. Moreover, application of varying definitions in different judicial circuits would cause economic discrimination and result in an intolerable administrative situation.[8]

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[5] Op. cit., supra note 4, pp. 130, 131, 134.

[6] 320 U. S. 725, 64 S. Ct. 59.

[7] Respondent's memorandum pp. 8, 19.

[8] The cases cited in Appendix E, page 26 of the petition for a writ of certiorari indicate that this condition exists now.

The case at bar involves a question which was reserved by this Court in *Holly Hill.* It also involves every facet of the present definition and therefore invites definitive review.

3. The definition of "area of production" contained in the current regulations is arbitrary and the court below erred in reversing the district court and holding the definition valid.

This Court, in *Holly Hill,* held that the Congress in granting exemptions for workers in the "area of production (as defined by the Administrator)" restricted the Administrator to the drawing of geographic lines after taking into consideration all relevant economic factors in the choice of areas open to him that operate between agricultural labor conditions and the labor market of enterprises concerned with agricultural commodities and located more or less near their production. Instead of following that decision and establishing geographic lines or areas after considering relevant economic factors to determine the boundaries of such areas, the Administrator employed a population test which arbitrarily excludes from the "area of production" all employment in towns or cities having a population of 2,500 or more. The Administrator on page 12 of his memorandum in response to the petition for a writ of certiorari states that results reached by other governmental agencies having long experience in distinguishing between rural and urban areas were heavily relied upon in choosing the 2,500 population figure. This heavy reliance upon, and virtual adoption of, a population test developed by other government agencies for entirely different purposes demonstrates the arbitrary manner in which "area of production" has been defined.

The fact that a village or town may consist of 2,500 people is not relevant to a determination of whether an individual employed therein is within or without the "area of production". Nevertheless, this population test is used in the regulation as being conclusive of the question and when

applied to compress warehouse plants such a test excludes from the "area of production" 82 percent of all such plants.[9] Had the Congress intended that a numbers test be used to restrict the "area of production," Section 13 (a)(10) could have so provided. In granting exemptions under Section 13(a)(8) and under Section 13(a)(11) relating to employees employed on newspapers, and switchboard operators employed in public telephone exchanges, the Congress limited the exemption to newspapers having a circulation of less than 4,000 and public telephone exchanges having not more than 750 stations. The fact that the Congress specifically provided for a numbers test in Section 13(a)(8) and in Section 13(a)(11) indicates that it did not intend for any such test to be arbitrarily employed in determining the "area of production" exemption in Section 13(a)(10).

Respondent in his memorandum at page 13 after pointing out that this Court expressly declined to pass on the validity of the population test in *Holly Hill*, because the establishment there met the test, argues that it is an indisputable fact that substantially all agricultural production of any significance is carried on in rural areas and not in urban centers and concludes that it is difficult to find fault with that part of the definition which excludes the centers of urban population. This line of reasoning clearly shows how the Administrator has misconceived the clear intent of Congress. Apparently, he assumes that towns of 2,500, since they are classed as urban for census purposes, are necessarily industrial areas and therefore outside the "area of production". If this had been the test which the Congress intended to be used, it could have obtained this result with simple and explicit language. The fact that it did not intend such application of the Act is clear from the language of the Act itself, the legislative history, and the decision of this Court in *Holly Hill*. These all show that the

[9] See petition for writ of certiorari, page 18.

legislative purpose was to exclude from the wage and hour provisions of the Act not only employment in agriculture but also certain non-agricultural activities reasonably related to the processing and marketing of agricultural commodities, in order to relieve farmers of additional financial burdens either in the form of specific charges or in a lessening of prices received for their commodities. Whether an activity is so related to agriculture as to be within the "area of production" is, as stated by this Court, dependent upon a consideration of all relevant economic factors. This the Administrator patently has not done. The definition is, therefore, arbitrary and invalid and unless stricken will result in unjustified competitive inequalities and grave economic dislocations.

For the reasons stated above and in the interest of sound and effective administration of an important federal statute about which there has been great uncertainty, confusion and much litigation concerning the scope of its application, it is submitted that the petition for rehearing should be granted and that, upon such rehearing, a writ of certiorari should issue.

Respectfully submitted,

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APPENDIX A

Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended by the Act of October 26, 1949, 63 Stat. 910, 29 U.S.C., Supp. V, 213:

Sec. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to * * * (6) any employee employed in agriculture * * * ; or * * * (8) any employee employed in connection with the publication of any weekly, semiweekly, or daily newspaper with a circulation of less than four thousand the major part of which circulation is within the county where printed and published or counties contiguous thereto; or * * * (10) any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; or (11) any switchboard operator employed in a public telephone exchange which has not more than seven hundred and fifty stations; * * * .

APPENDIX B

Text of the Administrator's regulation defining the "area of production." (29 C.F.R. 536.2)

"Area of production" as used in section 13(a)(10) of the Fair Labor Standards Act.

(a) An individual shall be regarded as employed in the "area of production" within the meaning of section 13(a)(10) in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products:

(1) If the establishment where he is employed is located in the open country or in a rural community and 95 per cent of the commodities on which such operations are performed by the establishment come from normal rural sources of supply located not more than the following air lines distances from the establishment:

(i) With respect to the ginning of cotton—10 miles;

(ii) With respect to operations on fresh fruits and vegetables—15 miles;

(iii) With respect to the storing of cotton and any operations on commodities not otherwise specified in this subsection—20 miles;

(iv) With respect to the compressing and compress warehousing of cotton, and operations on tobacco (other than Puerto Rican leaf tobacco), grain, soybeans, poultry or eggs—50 miles.

(b) For the purposes of this section:

(1) "Open country or rural community" shall not include any city, town, or urban place of 2,500 or greater population or any area within

(i) One air-line mile of any city, town, or urban place with a population of 2,500 up to but not including 50,000, or

(ii) Three air-line miles of any city, town, or urban place with a population of 50,000 up to but not including 400,000, or

(iii) Five air-line miles of any city with a population of 500,000 or greater

according to the latest available United States Census.

(2) The commodities shall be considered to come from "normal rural sources of supply" within the specified distances from the establishment if they are received (i) from farms within such specified distances, or (ii) from farm assemblers or other establishments through which the commodity customarily moves, which are within such specified distances and located in the open country or in a rural community, or (iii) from farm assemblers or other establishments not located in the open country or in a rural community provided it can be demonstrated that the commodities were produced on farms within such specified distances.

(3) The period for determining whether 95 percent of the commodities are received from normal rural sources

of supply shall be the last preceding calendar month in which operations were carried on for two workweeks or more, except that until such time as an establishment has operated for such a calendar month the period shall be the time during which it has been in operation.

(4) The percentage of commodities received from normal rural sources of supply within the specified distances shall be determined by weight, volume or other physical unit of measure, except that dollar value shall be used if different commodities received in the establishment are customarily measured in physical units that are not comparable.